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REGULATORY AUTH.

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apulliam@mcguirewoods.com  
Direct Fax: 404.443.5777

November 13, 2001

OFFICE OF THE  
EXECUTIVE SECRETARY

**VIA HAND DELIVERY**

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: BellSouth Telecommunications v. VarTec Telecom, Inc., d/b/a VarTec Telecom  
and Clear Choice Communications, Case No. 01-00906

Dear Mr. Waddell:

Enclosed for filing in the above-referenced matter is an original and 13 copies of Defendant's Notice to Plaintiff of Removal together with attachments removing the case from the Tennessee Regulatory Authority to the United States District Court for the Middle District of Tennessee. The Notice of Removal of Civil Action has been filed with the United States District Court today and a copy of that Notice is attached.

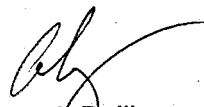
Please file stamp the enclosed extra copy of this Notice to Plaintiff of Removal and return same to the undersigned in the self-addressed, stamped envelope provided.

If you have any questions concerning this filing, please do not hesitate to contact Jim Lister at (202) 857-1700 or me at the number indicated above.

Thank you for your assistance in handling this matter.

Very truly yours,

McGuireWoods LLP

  
Andrew J. Pulliam

AJP/tac  
Enclosures

# CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

BellSouth Telecommunications, Inc.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Davidson Co., TN  
(EXCEPT IN U.S. PLAINTIFF CASES)

## (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Joelle Phillips and Guy Hicks, BellSouth  
Telecommunication  
333 Commerce Street  
Nashville, TN 37201-3300

## DEFENDANTS

VarTec Telecom, Inc. d/b/a VarTec Telecom and  
Clear Choice Communications Company

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Fulton Co., GA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

## ATTORNEYS (IF KNOWN)

see attachment

## II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |                                         | PTF                                   | DEF                                   |                                                               | PTF                                   | DEF                                   |
|-----------------------------------------|---------------------------------------|---------------------------------------|---------------------------------------------------------------|---------------------------------------|---------------------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1            | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4            | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input checked="" type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation                                                | <input type="checkbox"/> 6            | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 161 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans) <input type="checkbox"/> 163 Recovery of Overpayment of Veteran's Benefits <input checked="" type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 861 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commercial/CC Rates/etc <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1396lf) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS — Third Party 26 USC 7609

## V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding  
☒ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. 28 U.S.C. Section 1332. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

Removal of action by defendant against plaintiff under diversity and federal question jurisdiction. Complaint alleges violation by plaintiff in Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Services.

## VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION  
☐ UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

November 13, 2001

*Joelle Phillips*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

Defendant's Attorneys

Andrew Pulliam  
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Fax 404.443.5599

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**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE**

BELLSOUTH  
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

VARTEC TELECOM, INC. D/B/A  
VARTEC TELECOM AND CLEAR  
CHOICE COMMUNICATIONS,

Defendant.

Case No.

**NOTICE OF REMOVAL**

Defendant VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications ("VarTec"), through undersigned counsel, and pursuant to 28 U.S.C. §§ 1441 and 1446, hereby notices the removal to this Court of Case No. 01-00906 currently pending before the Tennessee Regulatory Authority. In support of this Notice of Removal, VarTec states as follows:

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), filed a complaint against VarTec seeking \$1,052,038.00 in damages from VarTec with the Tennessee Regulatory Authority on or about October 18, 2001. VarTec was served with this Complaint on or about October 18, 2001. The premise of the Complaint is that VarTec, which purchases both interstate and intrastate telecommunication services from BellSouth, allegedly reported inaccurate estimates of "percent interstate usage." BellSouth alleges that it uses these estimates to calculate the amount to bill VarTec. BellSouth claims that VarTec owes more than it has paid and demands payment of the amount allegedly owed.

2. This Notice of Removal is filed with this Court within thirty (30) days of receipt of the Complaint as required by 28 U.S.C. § 1446(b).

3. Under 28 U.S.C. § 1441(a), a case may be removed to the federal district court provided it is a civil action over which the district court would have had original jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 355-56 (1988) (citing Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344-45 n.9, (1976)) (holding that a district court has no discretion to decline to accept a removed diversity jurisdiction case). In the present case there is diversity under 28 U.S.C. § 1332(a) as BellSouth is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Georgia, whereas VarTec is a corporation organized and existing under the laws of the State of Texas with its principal place of business in that state. Diversity of citizenship exists presently and existed at the time Plaintiff filed the Complaint. The amount in controversy exceeds \$75,000 as required by 28 U.S.C. § 1332. In addition, the Complaint filed also presents a federal question providing jurisdiction under 28 U.S.C. § 1331 because BellSouth's theory of liability depends on the difference between the rates for interstate service set forth in a tariff filed with the Federal Communications Commission (governed by federal law) and the rates for intrastate services set forth in Tennessee tariffs, and BellSouth must prove that difference as part of its case.

4. The Tennessee Regulatory Authority is a state court for purposes of the requirement of 28 U.S.C. § 1441 that the action have originated in a "state court." Federal courts considering this question with similar agencies have applied a two part "functional" test to determine whether the entity from which removal is sought is a "court" for purposes of removal jurisdiction. First, the federal court must "evaluate the functions, powers, and procedures of the state tribunal" to determine if it is acting in an adjudicatory manner similar to that of a court. Secondly, the court must "consider those factors along with the respective state and federal interests in the subject matter and in the provision of a forum." Floeter v. C.W. Transport, Inc., 597 F.2d 1100, 1102

(7th Cir. 1979); see also Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board, 454 F.2d 38, 44 (1st Cir. 1972).

5. The Tennessee Regulatory Authority's procedures are "substantially similar to those traditionally associated with the judicial process." See Floeter v. C.W. Transport, Inc., 597 F.2d 1100 (7th Cir. 1979); see also Kolibash v. Committee on Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989) (Court held that Bar Committee that was authorized to hold evidentiary hearings, subpoena witnesses, take testimony under oath, make factual findings and recommend sanctions was a state court for purposes of removal under Section 1442, a statute similar to Section 1441); Oregon Bureau of Labor & Indus. v. US West Communications, Inc., 2000 U.S. Dist. LEXIS 16300 (D. Or. 2000) (Court ruled that state agency is similar enough to a state court to be considered a state court for purposes of removal under § 1441); Martin v. Schwerman Trucking Co., 446 F. Supp. 1130 (D. Wis. 1978) (Removal from state agency appropriate where agency follows procedures which may be described as judicial in character).

6. Under Tennessee law governing the Tennessee Regulatory Authority's procedures, an action is instituted through the filing of a complaint, to which an answer must be filed in thirty days. T.R.A. Rules 1220-1-2.09, 1220-1-2.03. The parties engage in discovery and subpoenas are issued in accordance with the Tennessee Rules of Civil Procedure. T.R.A. Rule 1220-1-2.13. Persons who become parties to a contested case before the commission have a statutory right "to present evidence and argument in accordance with the rules of the [commission]." Tenn. Code Ann. § 65-2-108 (Supp. 1996). Final orders issued by the Authority are appealed directly to the Tennessee Court of Appeals. Tenn. Code Ann. § 4-5-322 (Supp. 2001). Clearly, the procedures of the Tennessee Regulatory Authority are substantially similar to those of the judicial process for purposes of removal.

7. Plaintiff's Complaint makes no claims for prospective relief or state regulatory changes. The Complaint is premised on a private dispute over money damages based on Plaintiff's claim that Defendant improperly reported the relative amounts of interstate usage (governed by federal tariffs) and intrastate usage (governed by state tariffs) of Plaintiff's services.

8. Significantly, this division of minutes of use and service revenue between state tariffs and federal tariffs must be done consistently with federal law. See Hawaiian Telephone Co. v. Public Utility Commission of the State of Hawaii, 827 F.2d 1264, 1274-1276 (9<sup>th</sup> Cir. 1987); see also BellSouth Telecommunications, 8 FCC Rcd. 1403 (1993). VarTec will demonstrate that BellSouth's actions with regard to this division are inconsistent with this federal law in that BellSouth has failed to exhaust the Percentage Interstate Usage dispute resolution procedures in its federal tariff that are a prerequisite to filing suit, and in that BellSouth also seeks to disregard the tariff's limitation on retroactive readjustment of Percentage Interstate Usage estimates. Thus, there is a substantial federal interest in the subject matter of this litigation.

9. Removal of this action is proper under 28 U.S.C. § 1441(a) because the Court has original jurisdiction over Plaintiff's claims.

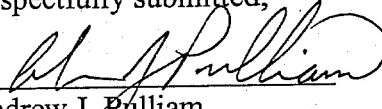
10. Venue lies in this Court because BellSouth's action is pending in this district and division. 28 U.S.C. § 1441(a).

11. The Executive Secretary of the Tennessee Regulatory Authority and BellSouth's counsel have been given written notice of the filing of this petition.

12. Copies of all pleadings filed with the Tennessee Regulatory Authority in this action are attached.

VarTec therefore respectfully Notices the Removal of this action to this Court from the  
Tennessee Regulatory Authority

Respectfully submitted,



Andrew J. Pulliam  
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James U. Troup  
James H. Lister  
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Attorneys for VarTec Telecom, Inc.



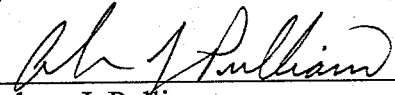
**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November 2001, a copy of the foregoing NOTICE OF REMOVAL TO FEDERAL COURT was hand delivered to the following attorneys for BellSouth Telecommunications, Inc.:

Guy M. Hicks  
Joelle J. Phillips  
333 Commerce Street, Suite 2101  
Nashville, TN 37201-3300

and sent by first class mail to the following attorney for BellSouth Telecommunications, Inc.:

Wayne T. McGraw  
365 Canal Street, Room 3060  
New Orleans, LA 70130

  
\_\_\_\_\_  
Andrew J. Pulliam  
Tennessee Bar No. 16863

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE

BELLSOUTH  
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

VARTEC TELECOM, INC. D/B/A  
VARTEC TELECOM AND CLEAR  
CHOICE COMMUNICATIONS,

Defendant.


Case No.

**CERTIFICATE OF FILING AND SERVICE**

It is hereby certified that (1) Plaintiff was given written notice via United States Mail on the 13<sup>th</sup> day of November 2001 of Defendant's Notice of Removal in this Court; (2) a copy of the Notice of Removal is being filed today with the Tennessee Regulatory Authority, and (3) that a true and correct copy of said written notice is attached hereto.

Dated this 13<sup>th</sup> day of November 2001.

Respectfully submitted,



Andrew J. Pulliam  
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Attorneys for VarTec Telecom, Inc.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**Nashville, Tennessee**

BELLSOUTH  
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

VARTEC TELECOM, INC. D/B/A  
VARTEC TELECOM AND CLEAR  
CHOICE COMMUNICATIONS,

Defendant.

Case No. 01-00906

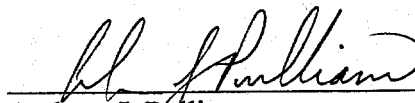
**NOTICE TO PLAINTIFF OF REMOVAL**

**TO: DAVID WADDELL, EXECUTIVE SECRETARY, TENNESSEE REGULATORY  
AUTHORITY**

**TO: JOELLE PHILLIPS, ATTORNEY FOR PLAINTIFF**

Pursuant to the provisions of 28 U.S.C. § 1446 (d), VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications ("VarTec") files herewith a true copy of the Notice of Removal removing this case to the United States District Court for the Middle District of Tennessee, and previously filed with that Court on November 13, 2001.

Respectfully submitted,



Andrew J. Pulliam  
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Phone 202.857.1700  
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Attorneys for VarTec Telecom, Inc.

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In re: *Complaint of BellSouth Telecommunications, Inc. Regarding the Practices of VarTec Telecom, Inc., d/b/a VarTec Telecom and Clear Choice Communications Company, in the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Services*

Docket No. 01-00906

COMPLAINT

BellSouth Telecommunications, Inc. ("BellSouth"), through its undersigned counsel, hereby files this Complaint against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications ("VarTec") pursuant to the Tennessee Code, Title 65, Chapter 4 and Rule 1220-1-2-.09 of the Tennessee Regulatory Authority ("Authority").

In support of its Complaint, BellSouth avers the following:

1. BellSouth provides local exchange telecommunications services in various states, including Alabama, Florida, Kentucky, North Carolina, Mississippi, South Carolina and Tennessee.

2. VarTec is an interexchange telecommunications company that provides intrastate and interstate interLATA long-distance service to customers in various states, including Tennessee. VarTec's business address, according to Authority records, is VarTec, 1600 Viceroy Drive, Dallas, Texas 75235.

3. Interexchange companies, such as VarTec, use the networks of local exchange companies, such as BellSouth, in order to access their customers. A typical interLATA long-distance telephone call originates on one local exchange

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

BELLSOUTH  
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

VARTEC TELECOM, INC. D/B/A  
VARTEC TELECOM AND CLEAR  
CHOICE COMMUNICATIONS,

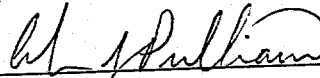
Defendant.

Case No.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 8(a)(3), Defendant, VarTec Telecom, Inc. ("VarTec"), states that CommuniGroup, Inc. has a majority ownership interest in VarTec Telecom, Inc. and Telephone Electronics Corporation owns CommuniGroup, Inc. Additionally, no publicly held companies own 10% or more of VarTec's stock.

Respectfully submitted,



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Attorneys for VarTec Telecom, Inc.

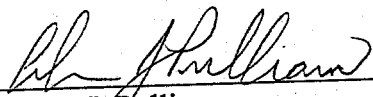
**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November 2001, a copy of the foregoing Corporate Disclosure Statement was hand delivered to the following attorneys for BellSouth Telecommunications, Inc.:

Guy M. Hicks  
Joelle J. Phillips  
333 Commerce Street, Suite 2101  
Nashville, TN 37201-3300

and sent by first class mail to the following attorney for BellSouth Telecommunications, Inc.:

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